



STATE ETHICS COMMISSION

1324 MAIL SERVICE CENTER
RALEIGH, NC 27699-1324
WWW.ETHICSCOMMISSION.NC.GOV

ROBERT L. FARMER
CHAIRMAN

PERRY Y. NEWSON
EXECUTIVE DIRECTOR

STATE ETHICS COMMISSION-1/28/2010 ADDITIONAL GUIDANCE FOR APPLICATION OF AO-L-09-010

I. Applicable Statutory Provisions.

Article 4 of G.S. Chapter 120C imposes certain reporting responsibilities on lobbyists and lobbyist principals. G.S. 120C-403 specifies the content of the lobbyist principal's report. G.S. 120C-403(b)(3) requires a lobbyist principal to report:

With respect to each lobbyist registered under G.S. 120C-206, payment for services paid to all lobbyists during that quarter. If the lobbyist is a full-time employee of the principal, or is paid by an annual fee or retainer, the principal shall estimate and report the portion of the salary, fee, or retainer that is reasonably allocated for the purpose of lobbying. The principal may rely upon a statement by the lobbyist estimating the portion of the salary, fee, or retainer that is reasonably allocated for the purpose of lobbying.¹

G.S. 120C-100(a)(11k) defines "payment for services" as "any money, thing of value, or economic benefit paid to a lobbyist *for the purpose of lobbying* other than reimbursement of actual travel, administrative expenses, or subsistence." The phrase "for the purpose of lobbying" is not defined in G.S. Chapter 120C. However, it clearly includes payments made by a lobbyist principal to a lobbyist for engaging in activities that constitute direct or goodwill lobbying.

II. Determining What Constitutes Payments for Services for the Purpose of Lobbying.

A. AO-L-09-010.

In AO-L-09-010² the Commission interpreted the phrase "for the purpose of lobbying" in the definition of "payment for services." The Commission determined that the phrase "for the purpose of lobbying" encompassed more communications and activities than those included under the definition of "lobbying." The Commission concluded that a "but for" test should be

¹ AO-L-08-004 provides advice as to the manner in which fees could be "reasonably allocated."

² The reporting requirements established in that opinion apply to the reporting period commencing January 1, 2010.

applied to determine whether services provided by a lobbyist are related to lobbying communication or activities. If the lobbyist would not be providing those services but for the fact that he or she is engaged in lobbying, direct or goodwill, on behalf of a principal for a **particular** legislative or executive action, those services are “for the purpose of lobbying” and those payments must be reported, in addition to any payments paid to the lobbyist for lobbying communications and activities.

The facts and circumstances underlying the lobbyist’s activities are critical to the application of the “but for” test. In applying that test, one must first focus on the central activity in question and whether that activity is “lobbying.”³ If an individual is engaged in “lobbying”, a lobbyist principal must report payments made to the individual for (i) communications or activities with a designated individual made with the intent of influencing a particular legislative or executive action and (ii) services connected with those communications or activities.

The latter obligation would require reporting of amounts paid to a lobbyist for services that he or she would not be performing if he or she were not engaged in particular lobbying communications or activities. This would include payments for research, the drafting of communications or other documents, monitoring particular legislative or executive actions, and preparing for and participating in telephone calls, meetings, and other events that relate to lobbying communications or activities. It would not include payments for services that are unrelated to lobbying communications or activities, such as general communications with customers or company personnel concerning pending or current legislation or regulatory matters, or the preparation of studies or reports regarding those matters.

B. Analogous Federal Law Provisions.

The lobbying law’s definition of lobbying and the “but for” standard adopted by the Commission in determining what services are “for the purpose of lobbying” are similar to federal tax code provisions restricting the deductibility of lobbying-related expenditures. The payments which AO-L-09-010 requires that a lobbyist principal report are similar to those types of expenditures deemed to be paid or incurred in connection with lobbying under the federal tax code. Specifically, 26 U.S.C 162(e)(1) restricts businesses from deducting certain expenditures that are connected to lobbying, including amounts “**paid or incurred in connection with:**”

- (1) “Influencing legislation,” defined as “any attempt to influence any legislation through communication with any member or employee of a legislative body ...;” and
- (2) “Any direct communications with a covered executive branch official in an attempt to influence the official actions or positions of such official.”

Similar to North Carolina’s definition, “lobbying” is interpreted as influencing or attempting to influence specific legislative or executive branch actions. 26 C.F.R. 1.162-29(b)(3)(i). Accordingly, for an expenditure to be “paid or incurred in connection with”

³ Lobbying is defined as (i) direct communications or activities with designated individuals or their immediate family members (ii) designed to influence “legislative or executive action.”

lobbying, it must be tied to specific legislative or executive actions. “Legislative bodies” include “state legislatures, and other similar governing bodies.” 26 C.F.R. 1.162-29(b)(6).

Regulations adopted to interpret Section 162(e)(1) include within the definition of lobbying-related expenditures “lobbying communications” and other activities “such as research, preparation, planning, and coordination, including deciding whether to make a lobbying communication, engaged in for a purpose of making or supporting a lobbying communication, even if not yet made.” 26 C.F.R. 1.162-29(b)(1)(ii). A “lobbying communication” includes a communication that

- (i) Refers to specific legislation and reflects a view on that legislation; or
- (ii) Clarifies, amplifies, modifies, or provides support for views reflected in a prior lobbying communication.

26 C.F.R. 1.162-29(b)(3).

The federal regulations further identify the following non-exclusive facts and circumstances to be applied in determining whether an activity is “for the purpose of making or supporting” a lobbying communication:

- (i) Whether the activity and the lobbying communication are proximate in time;
- (ii) Whether the activity and the lobbying communication relate to a similar subject matter;
- (iii) Whether the activity is performed at the request of, under the direction of, or on behalf of a person making the lobbying communication;
- (iv) Whether the results of the activity are also used for a non-lobbying purpose; and
- (v) Whether, at the time the taxpayer engages in the activity, there is specific legislation to which the activity relates.

26 C.F.R. 1.162-29(c)(1). A number of examples of activities that are and are not deemed to be for the purpose of a lobbying communications are set forth in those regulations. Where the activity is engaged in for a lobbying and non-lobbying purpose, the taxpayer may not deduct those costs “that would not have been incurred but for the lobbying purpose.”

C. Analytical Framework for Determining if a Service is “For the Purpose of Lobbying.”

To determine if a service is for the purpose of lobbying, requiring the reporting of the payment for this service, the following analysis (the AO-L-09-010 “but for” test) should be applied:

- (1) Is the principal planning to communicate or currently engaged in communications or activities with a designated individual or his or her immediate family?

If not, the service being provided is not lobbying or for the purpose of lobbying and the payment for those services and any related services need not be reported

If yes, go to number two.

- (2) Are those communications or activities with a designated individual or immediate family intended to influence any particular current or future legislative or executive action?

If not, the communication or activity is not lobbying or for the purpose of lobbying and the payment for those non-lobbying services and any related services need not be reported.

If yes, the communications or activities are lobbying. The payments for the lobbying communications and activities, and for certain services related to the lobbying services, must be reported. Go to number three to determine what related services are “for the purpose of lobbying,” requiring that payments to the lobbyist for such related services be reported.

- (3) Would the lobbyist be performing this related service for the principal if he or she were not engaged in lobbying communications or activities?

If yes, the related service is not “for the purpose of lobbying” and therefore, payments to the lobbyist for this service need not be reported.

If not, the related service is “for the purpose of lobbying” and payments to the lobbyist for this service must be reported. If the lobbyist is paid by an annual salary, fee, or retainer, the portion of the lobbyist’s salary, fee or retainer that is a reasonable allocation for the lobbyist providing this non-lobbying service must be reported by the principal.

III. Hypothetical Questions.

Are the following services provided by a lobbyist “for the purpose of lobbying,” requiring the lobbyist principal to report the payments for these services on its lobbyist principal expense report?

- (1) Assisting company officials with the development and structure of committees designed to address various business issues and identifying and recommending individuals for appointment to these committees?

Probably not. Apply the “but for” test. These appear to be internal functions and services for the operation of the company. Time spent developing such committees and identifying individuals for appointment to committees created appears to be unrelated to communications or activities designed to influence a particular legislative or executive action.

- (2) Assisting a lobbyist principal association with increasing its membership?

Probably not. Apply the “but for” test. These services appear to be unrelated to communications or activities designed to influence a particular legislative or executive action.

- (3) Interacting with a lobbyist principal’s members or representatives?

Possibly. The answer to this question depends upon whether the interactions are related to lobbying, communications or activities with a designated individual designed to influence a particular current or future legislative or executive action. Apply the “but for” test to determine if the interactions are “for the purpose of lobbying,” requiring the lobbyist principal to report the payments for these services. For example, the time a lobbyist spends discussing lobbying strategy or preparing individuals to communicate with designated individuals would need to be reported if those services would not have been provided if the principal were not engaged in lobbying communications or activities.

- (4) Researching and developing the lobbyist principal’s positions on issues?

Possibly. Apply the “but for test.” In the event the time spent researching and developing the principal’s “positions” is related to communications or activities designed to influence a particular current or future legislative or executive action, and would not have occurred if the principal were not engaged in those lobbying communications or activities, the services are “for the purpose of lobbying” and the principal must report the payments for these services.

- (5) Making presentations to the lobbyist principal's officials, board members, or committees?

Possibly. Apply the "but for test." The answer would depend upon the nature of the presentation. For example, in the event a presentation is related to the development of the principal's lobbying communications or activities, and would not have occurred if the principal were not engaged in those lobbying communications or activities, these services are "for the purpose of lobbying" and the principal is required to report the payment for these services.

- (6) Providing general administrative support to the lobbyist principal, its officials, or committees?

Probably not. Apply the "but for" test. These types of services appear to be unrelated to communications or activities designed to influence a particular legislative or executive action.